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November 16, 2016

Clerk
Michigan Supreme Court
P. O. Box 30052
Lansing, MI 48909

Re: **People v Dwayne Edmund Wilson**
Supreme Court No. _____
Court of Appeals No. 324856
Lower Court No. 09-2637FC,

Dear Clerk:

Enclosed please find the Response to Plaintiff-Appellant's Application for Leave to Appeal for filing in the above-referenced cause.

Thank you for your attention to this matter.

Sincerely,

/s/ Peter Jon Van Hoek

Peter Jon Van Hoek
Assistant Defender

pvh
Enclosures

cc: Macomb County Prosecutor
Court of Appeals Clerk
Macomb County Circuit Court Clerk
Dwayne Edmund Wilson
File

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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

-vs-

DWAYNE EDMUND WILSON

Defendant-Appellee

Supreme Court No. _____

Court of Appeals No. 324856

Lower Court No. 09-2637FC,

MACOMB COUNTY PROSECUTOR

Attorney for Plaintiff-Appellant

PETER JON VAN HOEK (P26615)

Attorney for Defendant-Appellee

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

BY: PETER JON VAN HOEK (P26615)

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellee Dwayne Edmund Wilson was convicted, at a jury trial in Macomb County Circuit Court, the Hon. James Biernat Jr. presiding, of two counts of unlawful imprisonment, MCL 750.349b, and one count of possession of a firearm in the commission of a felony, MCL 750.227b. The trial in this matter occurred on September 24 to October 8, 2014. On November 19, 2014, Judge Biernat sentenced Mr. Wilson to a prison term of ten years, to be followed by concurrent terms of 100 to 180 months in prison, with jail credit of 1997 days. . Defendant appealed as of right from the convictions and sentences.

On May 10, 2016, the Court of Appeals issued an unpublished, per curiam opinion, affirming the convictions but ordering the felony-firearm sentence to be reduced to five years, and remanding the case to the trial court for reconsideration of the unlawful imprisonment sentences pursuant to *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). The Court denied Mr. Wilson's claim that the trial judge misscored the guidelines for the unlawful imprisonment convictions.

On July 5, 2016, Mr. Wilson filed a timely Application for Leave to Appeal in this Court. That application raised issues as to the affirmances of the convictions, and the Court of Appeals' decision on the scoring of the sentencing guidelines. That Application is currently pending in this Court.

On July 11, 2016, Plaintiff-Appellant filed an Application for Leave to Appeal in this Court. That application deals solely with the Court of Appeals' decision that Mr. Wilson was improperly

sentenced as a third violator of the felony-firearm statute¹, and sentenced to the mandatory prison term of ten years. The Court of Appeals held, in reliance on this Court's opinion in *People v Stewart*, 441 Mich 89; 490 NW2d 327 (1992), that where more than one felony-firearm conviction arises in a single case, only one conviction is counted for the purposes of a subsequent conviction under that statute. Accordingly, while Mr. Wilson does have two prior convictions for felony-firearm, both arose out of the same case, and thus his current conviction, under *Stewart*, must be treated as a second felony-firearm conviction, requiring the mandatory five year term preceding the terms for the unlawful imprisonment convictions.

Plaintiff-Appellant's Application for Leave asks this Court to overrule the precedent of *Stewart*, and reinstate the ten year prison term, on the basis that this Court, in *People v Gardner*, 482 Mich 41; 753 NW2d 78 (2008), this Court overruled its prior decision in *People v Preuss*, 436 Mich 714; 461 NW2d 703 (1990), which had held that, for the purposes of the habitual offender statutes, multiple convictions arising out of a single incident counted as only one prior felony conviction for habitual offender sentencing in subsequent cases. Plaintiff is arguing that since this Court in *Stewart* relied upon some of the reasoning in *Preuss* to reach its result, that decision was "implicitly" overruled by the decision in *Gardner*. The Court of Appeals below correctly held, however, that only this Court can overrule one of its own opinions, and that *Stewart* remains the controlling published authority on the precise issue presented in this case.

This Court should deny leave to appeal to Plaintiff-Appellant, and uphold the validity of the *Stewart* decision. If in fact the decision in *Gardner* eliminated all of the reasoning behind the decision in *Stewart*, it is highly likely that this Court, given the considerable number of felony-firearm convictions obtained in Michigan criminal cases, would have long ago decided to expressly

¹ MCL 750.227b.

overrule *Stewart*, based on *Gardner*. Instead, the *Stewart* opinion has now stood for 24 years on its own, and for 8 years after the release of the *Gardner* decision. It is long standing and correctly decided precedent that should be upheld under the general rules of stare decisis.

There is a logical and reasonable basis for this Court to treat multiple felony convictions within a single incident differently from multiple counts of felony-firearm within a single incident for the purposes of multi-conviction sentencing. Where there are multiple substantive felony convictions within a single case, that demonstrates the offender undertook separate and discrete acts which each supported a separate conviction. No one physical act of the offender violated separate criminal statutes. On the other hand, the fact that multiple counts of felony-firearm result in convictions in a single case commonly reflects only that the offender possessed a firearm during the incident, during with other felonious acts occurred. While it cannot and is not disputed that the possession of a single firearm during a sequence of felonious acts can legally and factually justify multiple counts of felony- firearm, one for each of the predicate underlying felonies, in nearly all such cases the offender did not possess a separate weapon in relation to each separate predicate felony – rather it was the same weapon that provided the basis for the felony-firearm charge related to each predicate felony.

On that basis, it is reasonable to assume that the Legislature, when it created the graduated sentencing scheme in the felony-firearm statute, meant to apply the second and third offender sentences only to offenders who once were found guilty of felony-firearm and then committed an additional act of felony-firearm in a subsequent incident. The Legislature created a strict sentencing scheme for the felony-firearm statute – not only are the sentences determinate rather than indeterminate, but also there is no discretion for the trial court to impose any sentence but the

mandatory term under the statute, and that term must run consecutive to and prior to any term imposed for the predicate felony. This is a very different sentencing scheme than that set forth in the general habitual offender statutes, where trial judge has discretion not to increase the punishment at all over the statutory maximums, and the sentence is not mandatorily consecutive to any other sentence.

It is reasonable to conclude the Legislature did not intend that the sentencing for a defendant skip directly from the two year mandatory term for a first offense to the mandatory ten year term for a third conviction, where the first two convictions occurred within the initial incident and the third conviction occurred during a second, subsequent incident. Instead, it is most likely the Legislature intended that where a defender serves a two year mandatory term (each two year term where there are multiple felony-firearm convictions in a single case run concurrently), he or she should be sentenced to the mandatory five year term the next time the offender again violates the statute.

This Court very likely has had many opportunities in the 8 years since the release of the *Gardner* decision to consider whether that case requires reversal of the *Stewart* decision. The current case presents no new or different arguments than any that may have been made in the past concerning the viability of the *Stewart* precedent. This Court should deny leave to appeal to Plaintiff-Appellant, and preserve the controlling law in *Stewart*.

Defendant moves this Honorable Court to deny Plaintiff-Appellant's application for leave to appeal

Respectfully submitted,

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Date: November 16, 2016.